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No. 88-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NEW ORLEANS PUBLIC SERVICE INC.,

Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, JOSEPH I. GIARRUSSO, LAMBERT C. BOISSIERE, JR., MICHAEL EARLY, JAMES SINGLETON, DOROTHY MAE TAYLOR, JOHNNY JACKSON, and PEGGY WILSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HERSCHEL L. ABBOTT, JR.
DAVID G. RADLAUER
EDWARD H. BERGIN
R. LEWIS MCHENRY
JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE
201 St. Charles Avenue
New Orleans, LA 70170
(504) 582-8000

REX E. LEE*
DAVID W. CARPENTER
JAMES A. HUTTENHOWER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

THOMAS O. LIND
Vice President-Regulatory Counsel
New Orleans Public Service Inc.
317 Baronne Street
New Orleans, LA 70112
(504) 598-2218

Attorneys For Petitioners

* *Counsel of Record*

QUESTION PRESENTED

Whether, under the abstention doctrines of *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), or *Younger* v. *Harris*, 401 U.S. 37 (1971), a federal district court may refuse to adjudicate a federal claim that a federal statute (in this case the Federal Power Act) and the explicit orders of a federal agency (here FERC) have preempted local regulatory authorities from making separate and inconsistent determinations of the very matters FERC has decided?

STATEMENT REQUIRED BY RULE 28.1

Petitioner New Orleans Public Service Inc. ("NOPSI") is a wholly-owned subsidiary of Middle South Utilities, Inc. ("MSU"). MSU has no parent company, and neither MSU nor NOPSI has any subsidiaries that are not wholly-owned by MSU either directly or through other wholly-owned subsidiaries.

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NEW ORLEANS PUBLIC SERVICE INC.,

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THE COUNCIL OF THE CITY OF NEW ORLEANS, JOSEPH I. GIARRUSSO, LAMBERT C. BOISSIERE, JR., MICHAEL EARLY, JAMES SINGLETON, DOROTHY MAE TAYLOR, JOHNNY JACKSON, and PEGGY WILSON,

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OPINIONS BELOW

The opinion of the Court of Appeals (Appendix ("App.") 1A-20A) is not yet published. The opinion of the District Court (App. 21A-33A) is unpublished.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on July 28, 1988. App. 1A-20A & 35A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case presents a question that is one of the most widely litigated and widely controverted in the federal system: whether abstention principles prohibit a federal district court from adjudicating a claim that a federal statute (here the Federal Power Act) vests exclusive jurisdiction over certain matters in a federal

regulatory agency (here the Federal Energy Regulatory Commission ("FERC")) and thereby preempts a local utility commission from making its own determination of those matters. The rule in the Fifth Circuit squarely conflicts with decisions of the Third, Fourth, Eighth, Ninth, Eleventh, and District of Columbia Circuits. Only the Sixth Circuit and one decision of the Fourth Circuit are consistent with the Fifth Circuit rule on this abstention issue. Accordingly, eight circuits are involved in the conflict. As the Fifth Circuit stated in this case, "[o]nly [the Supreme] Court can resolve the conflict among the federal courts about the appropriateness of abstention in this situation, and it has not yet spoken." App. 20A.

In 1986, the Court invited the Solicitor General to state the views of the United States on whether this abstention issue should be reviewed.[1] The United States and FERC then demonstrated that this conflict was impairing the enforcement of the Federal Power Act, and urged the Court to resolve the conflict in the context of an earlier phase of the very controversy that is at issue here.[2] However, at that time, litigation of the underlying Federal Power Act claim was contended (and later held) to be independently barred by principles of ripeness. The Solicitor General's Memorandum noted these "procedural problems," and the Court declined to review the abstention issue.[3]

Now the underlying federal claim is indisputably ripe. The Council of the City of New Orleans has finally denied recovery

[1]*See American Electric Power Co.* v. *Kentucky Public Service Commission,* 55 U.S.L.W. 3231 (Oct. 6, 1986).

[2]Brief for United States and Federal Energy Regulatory Commission As Amici Curiae, *American Electric Power Co.* v. *Kentucky Public Service Comm'n,* No. 86-49 (March, 1987), p. 16 ("We urge the Court to grant review [of the abstention question], instead in NOPSI.") (hereinafter "Solicitor General's 1987 NOPSI Mem.").

[3]*See New Orleans Public Service, Inc.* v. *New Orleans,* 107 S. Ct. 1910 (1987); *American Electric Power Co.* v. *Kentucky Public Service Comm'n,* 107 S.Ct. 1910 (1987).

of $135 million of petitioners' FERC-mandated costs, and the Council has ordered rate reductions to implement this "prudence" disallowance. Moreover, the City Council has continued to claim that this prudence disallowance is permissible, notwithstanding this Court's unequivocal June 24, 1988 holding in *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore,* No. 86-1970, 56 U.S.L.W. 4751 (June 24, 1988), that local regulatory authorities have no jurisdiction to disallow any of the same federally-mandated costs that are at issue here, on grounds of prudence or otherwise.

In short, this issue will not go away, and the conflict between the courts of appeals should be resolved now.

1. Factual Background. This case arises from the same facts and the same FERC orders at issue in *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore,* No. 86-1970, 56 U.S.L.W. 4751 (June 24, 1988). Here, as there, local utility regulators are attempting to use their retail ratemaking authority to nullify the FERC decisions (Opinions 234, 234A, 292 and 292A) that allocated the costs of the Grand Gulf 1 nuclear plant among the retail operating company subsidiaries of Middle South Utilities, Inc. ("MSU").

Petitioner New Orleans Public Service Inc. ("NOPSI") provides retail electric services in the City of New Orleans. Under Louisiana law, NOPSI's retail rates are regulated by the Council of the City of New Orleans ("Council").

Like Mississippi Power & Light Company ("MP&L"), NOPSI is a wholly-owned subsidiary of MSU. NOPSI is one of the four companies that "[t]hrough MSU . . . operate as an integrated power pool" and that exchange power among themselves at rates established by FERC. *Mississippi Power & Light Co.,* 56 U.S.L.W. at 4752, slip op. at 2. Like MP&L, NOPSI is thus subject to two FERC-approved rate schedules that determine how the costs of

Grand Gulf 1 are allocated: the 1982 System Agreement and the Unit Power Sales Agreement ("UPSA"). *See* 56 U.S.L.W. at 4753-54, slip op. at 5-9.

As originally filed, the rate schedule allocated to NOPSI 29.80% of the costs and output of Grand Gulf 1. The City of New Orleans ("City") participated extensively in the massive FERC proceedings that followed (*see* 56 U.S.L.W. at 4753-54, slip op. at 5-9; App. 4A), and the City urged that NOPSI be responsible for only 9% of Grand Gulf 1. Although FERC ordered a substantial reduction in NOPSI's allocation, FERC rejected the City's position and mandated a 17% allocation of Grand Gulf 1 for NOPSI.

Thus, when Grand Gulf 1 began commercial operations on July 1, 1985, NOPSI was required under the FERC order to begin incurring Grand Gulf 1 costs of approximately $15.5 million per month.

2. Prior Proceedings. On May 17, 1985, NOPSI filed an application with the Council for the retail rate increase required to recover its Grand Gulf 1 costs. This application was not granted by the Council. Instead, the Council, on October 17, 1985, adopted a resolution initiating an investigation into the prudence of NOPSI's involvement in Grand Gulf 1.

When the Council failed to act upon NOPSI's initial application, on August 1, 1985, NOPSI filed an action in federal district court to enforce its right to recover these FERC-mandated costs (*"NOPSI I"*). The District Court dismissed the suit under the Johnson Act and abstention principles. On February 22, 1986, the Fifth Circuit issued an opinion that reversed on both grounds, and remanded for a determination whether the "filed rate" doctrine required recognition of these costs. *New Orleans Public Service, Inc.* v. *New Orleans,* 782 F.2d 1236 (5th Cir. 1986). However,

on September 2, 1986, the Fifth Circuit, on its own motion, reversed itself, vacated the abstention discussion in its earlier opinion, and held that the District Court did not abuse its discretion in abstaining under the abstention doctrine articulated in *Burford* v. *Sun Oil Co.,* and possibly under the abstention doctrine established in *Younger* v. *Harris* as well. *Id.,* 798 F.2d 858 (5th Cir. 1986).

While the case was pending on appeal, NOPSI and the Council entered into a settlement in March, 1986. The settlement allowed a phased-in rate increase under which NOPSI would eventually recover all but $51 million of its Grand Gulf 1 costs, although any recovery was subject to the outcome of the ongoing prudence investigation. Under the settlement, NOPSI reserved its right to pursue its claim that the Council had no jurisdiction to conduct this prudence inquiry, and the Council, in turn, reserved its right to order adjustments in NOPSI's rates on the basis of that investigation.

The Council relied on this settlement agreement in opposing NOPSI's petition for certiorari from the September, 1986 Fifth Circuit decision in *NOPSI I.* The Council argued that the agreement mooted the case and also made the Federal Power Act claims not ripe. Although the United States believed that these facts did not detract from the appropriateness of a decision on the abstention issue in this case, these and related facts led the Solicitor General to state that "*NOPSI*[I] is not wholly free from procedural problems." Solicitor General's 1987 NOPSI Mem., p. 25.

The extent of the apparent ripeness problems was made manifest in a parallel case *(NOPSI II)* that NOPSI brought in November, 1985 to enjoin the Council's prudence inquiry. In defending that case, the Council stated that its pending prudence inquiry *would* fully recognize the FERC-mandated Grand Gulf 1 expenses

and would deal solely with whether NOPSI had achieved savings in other areas. This representation led the Fifth Circuit to hold that the underlying Federal Power Act claim was not ripe and to decline to reach the abstention issues. *New Orleans Public Service, Inc.* v. *New Orleans,* 833 F.2d 583, 588 (5th Cir. 1987).

3. This Case. There are no ripeness or procedural problems in this case. It is based on the *actual results* of the Council's prudence investigation, which was completed by adoption of a rate order on February 4, 1988. The order violates the Council's prior representations to the Fifth Circuit. It disallows $135 million in previously incurred, FERC-mandated Grand Gulf 1 expenses, and the Council's order implements this prudence disallowance by ordering reductions in NOPSI's future rate increases by approximately $500,000 per month this year, and by multiples of that amount in future years. This $135 million of "trapped costs" is in addition to the $51 million that NOPSI previously agreed to absorb in the March, 1986 Settlement with the Council.

The basis for the Council's $135 million disallowance is its decision to set NOPSI's rates to allow full recovery of only 9% of Grand Gulf 1—the same percentage that New Orleans had unsuccessfully urged in the FERC proceedings (*see* App. 11A)—and to permit recovery of the remaining 8% at the hypothetical costs of alternative coal-fired generation. The Council asserted that NOPSI had behaved "imprudently" in monitoring the costs of Grand Gulf 1, and in failing to sell a substantial portion of its share of Grand Gulf 1 off-system in 1979-80 (five to six years before either the rates for the power or the allocation had been established by FERC). As the Fifth Circuit stated in this case, this prudence disallowance appears to be squarely foreclosed by this Court's decision in *Mississippi Power & Light Co., supra.* App. 13A.

On February 9, 1988, NOPSI filed suit in federal district court to enjoin this violation of its federal rights.[4] The District Court dismissed the case on March 10, 1988, on grounds of abstention. App. 21A-33A. In the interim, there has been no resolution of any parallel state court proceedings, despite the trapping of FERC-mandated costs and resulting financial harm that occur each day. *See* App. 10A.[5]

On July 28, 1988, the Fifth Circuit affirmed. It held that the Fifth Circuit's earlier abstention decision was binding on it unless and until this Court resolved the conflict in the courts of appeals. App. 20A.

REASONS FOR GRANTING THE WRIT

The question whether abstention principles deprive federal district courts of authority to prevent state utility commissions from interfering with the exclusive jurisdiction of FERC (or other federal agencies) has become one of the most important and frequently recurring questions facing the federal judiciary. When the question was presented to the Court four years ago, only the Fourth Circuit had squarely addressed this issue.[6] This Court

[4]On the date of its order, the Council filed an action in the Civil District Court for the Parish of Orleans, Louisiana, seeking a declaratory judgment that its prudence order was lawful. That action was removed to federal district court and consolidated with the instant case. The state action was remanded to state court, however, after the federal court decided to abstain in this case.

[5]Because of the uncertainty over the availability of a federal forum, NOPSI, on March 7, 1988, filed a petition to review the Council's order in the Civil District Court for the Parish of Orleans, Louisiana. No hearing has occurred on the merits. On May 5, 1988, the state court denied NOPSI's motion for a preliminary injunction. NOPSI has appealed the denial of that motion. The intermediate Louisiana appellate court, however, has twice refused to expedite this interlocutory appeal, and the matter, therefore, will not be resolved before next year.

[6]*Aluminum Co. of America* v. *Utilities Comm'n of North Carolina,* 713 F.2d 1024 (4th Cir. 1983), *cert. denied,* 465 U.S. 1052 (1984). There, Alcoa had sought to litigate in federal district court the identical factual and legal claims under the Federal Power Act that this Court subse-

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denied certiorari, with Justices Brennan and White noting that they would have granted the petition. *Aluminum Co. of America* v. *Utilities Commission of North Carolina,* 465 U.S. 1052 (1984). In the intervening years, litigation of this question has burgeoned. Five circuits have addressed this abstention issue in cases presenting the same Federal Power Act (or Natural Gas Act)[7] preemption claims involved here.[8] In addition, other circuits have addressed the abstention issue in other closely related contexts.[9]

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quently decided in *Nantahala Power & Light Co.* v. *Thornburg,* 476 U.S. 953 (1986). The Fourth Circuit upheld the District Court's decision to abstain in that case, but in a subsequent case held that a decision not to abstain was proper. *Appalachian Power Co.* v. *Public Service Comm'n of West Virginia,* 770 F.2d 159 (4th Cir. 1985), *aff'g* 614 F.2d 64 (S.D. W. Va. 1985). Even in *Alcoa,* the Fourth Circuit acknowledged that abstention would not be appropriate where, as here, preemption was clear. 713 F.2d at 1029-30.

[7]This Court has stated many times that the "relevant provisions of [the Natural Gas Act and the Federal Power Act] 'are in all material respects substantially identical'" and that it is the Court's "established practice" to "cit[e] interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas Louisiana Gas Co.* v. *Hall,* 453 U.S. 571, 577 n.7 (1981) (citations omitted).

[8]*Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n,* 791 F.2d 1111 (3rd Cir. 1986) (court should not abstain from deciding Natural Gas Act claim); *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n,* 772 F.2d 404 (8th Cir. 1985) (court should not abstain from deciding Federal Power Act claim), *cert. denied,* 474 U.S. 1102 (1986); *Arkansas Power & Light Co.* v. *Missouri Public Service Comm'n,* 829 F.2d 1444 (8th Cir. 1987) (court should not abstain from deciding Federal Power Act claim); *Appalachian Power Co.* v. *Public Service Comm'n of West Virginia,* 770 F.2d 159 (4th Cir. 1985), *affg* 614 F.Supp. 64 (S.D. W. Va. 1985) (court should not abstain from deciding Federal Power Act claim); *New Orleans Public Service, Inc.* v. *New Orleans,* 782 F.2d 1236 & 798 F.2d 858 (5th Cir. 1986) (upholding abstention on Federal Power Act claim), *cert. denied,* 107 S. Ct. 1910 (1987); *American Electric Power Co.* v. *Kentucky Public Service Comm'n,* 787 F.2d 588 (6th Cir. 1986) (same), *cert. denied,* 107 S. Ct. 1910 (1987).

[9]*Champion Int'l Corp.* v. *Brown,* 731 F.2d 1406 (9th Cir. 1984) (abstention inapplicable where ERISA preempts state age discrimination

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The rule in the Fifth Circuit on this abstention question conflicts with decisions of five other courts of appeals as well as with the pertinent decisions of this Court. Thus, the conflict has spread to eight circuits, with five favoring the petitioner's view, two opposed, and the Fourth Circuit divided. *See* p. 8 nn.8 & 9, *supra.*

For these reasons, in response to this Court's request, the United States in 1987 urged the Court to grant certiorari to review the *NOPSI I* decision and to reject the Fifth Circuit's rule. *See* Solicitor General's 1987 NOPSI Mem., pp. 20-23. The Solicitor General made this recommendation at a time when the controversy was clouded by claims of lack of ripeness and by related "procedural problems." *Id.,* p. 25. The Court at that time declined the Solicitor General's invitation.

Now, however, the issue is squarely presented; there is no ripeness issue, and any possible procedural problems have vanished. *See* pp. 5-7, *supra.* The intervening events further confirm the Solicitor General's prediction that this abstention issue will not go away, but will recur, again and again. As the Fifth Circuit's opinion in this case correctly states, only this Court can resolve the conflict. *See* App. 20A.

1. The rule in the Fifth Circuit is that federal district courts have discretion to abstain from deciding claims that local utility regulators have violated federal rights conferred by federal statutes (*e.g.,* the Federal Power Act) that preempt state regulation. The Fifth Circuit reasons that these federal claims should be raised in appeals from state retail rate orders in state courts. This Court's holdings teach that the Fifth Circuit's rule must be rejected.

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laws); *Family Division Trial Lawyers* v. *Moultrie,* 725 F.2d 695 (D.C. Cir. 1984) (abstention inapplicable to constitutional challenge to local judicial administration); *Baggett* v. *Dept. of Professional Regulation,* 717 F.2d 521 (11th Cir. 1983) (abstention inappropriate to claim that state had no jurisdiction to discipline federally licensed marine pilot).

This Court has held that a federal court may not exercise "judicial discretion to dismiss a suit merely because a State court could entertain it" and that a federal court can abstain from "adjudicat[ing] a controversy properly before it . . . . only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Colorado River Water Conservation Dist.* v. *United States,* 424 U.S. 800, 813-14 (1976).

This Court's holdings teach that state courts cannot have an overriding interest in adjudicating whether Congress has intended that a federal regulatory agency have exclusive jurisdiction over certain matters and therefore has preempted contrary state action. This Court has upheld the authority of federal courts to enjoin state utility commission action on the same basic preemption grounds presented here, and has rejected arguments that state remedies must be exhausted—without even addressing whether abstention was required or permitted. *See, e.g., Public Utilities Comm'n of California* v. *United States,* 355 U.S. 534, 540 (1958); *Public Utilities Comm'n of Ohio* v. *United Fuel Gas Co.,* 317 U.S. 456 (1943); *see also Schneidewind* v. *ANR Pipeline Co.,* No. 86-986, 56 U.S.L.W. 4249 (Mar. 22, 1988).

These principles apply with special force in cases presenting federal preemption claims under the Federal Power Act. The Act establishes a federal agency (FERC) to referee disputes among states on the allocation of low-cost and high-cost electric power supplies. The purposes of the Act would be frustrated if individual states could act based on local concerns and collaterally attack the FERC's allocation by adopting allocations (or rates reflecting allocations) that prefer their interests to those sought to be protected by the FERC. *See Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore,* No. 86-1970, 56 U.S.L.W. 4751 (June 24, 1988); *Nantahala Power & Light Co.* v. *Thornburg,* 476 U.S. 953 (1986). Unless federal district courts have authority to enforce the FERC-established federal rights under the filed rate doctrine,

states can thwart the federal regulatory scheme and subvert interstate power supply arrangements adopted thereunder. Given this Court's limited resources, it is both impractical and unrealistic to expect that the entire burden of reviewing state actions in these cases can or ought to rest here.

2. The Fifth Circuit rule of abstention is based on this Court's holding in *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943). However, this Court, and numerous federal courts of appeals, have held that *Burford* is a narrow exception to the duty of federal courts to adjudicate claims properly before it, and it is inapposite here. As this Court has held, *Burford* abstention applies only where "difficult questions of state law" are presented and "federal review . . . would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation District* v. *United States, supra,* 424 U.S. at 814.

Thus, numerous courts of appeals have held that *Burford* cannot support abstention in a case such as this where *no* state law issues are presented and the only issue is whether federal law preempted the state agency from deciding the matter at all. Indeed, the Third and Eighth Circuits have so held in cases presenting the very Federal Power Act (or Natural Gas Act) preemption claims at issue here. As the Eighth Circuit has stated:

> "The very premise of [the *Burford*] doctrine, . . . is lacking when, as here, federal law or Constitution makes the proceeding or regulation at issue beyond the state's authority. There is no concern with protecting a legitimate state regulatory scheme, and the question becomes one of basic federal supremacy, which does not turn on local factors or local expertise."

Middle South Energy, Inc. v. *Arkansas Public Service Comm'n,* 772 F.2d 404, 417 (8th Cir. 1985) (citations omitted), *cert. denied,* 474 U.S. 1102 (1986); *accord, Kentucky West Virginia Gas Co.* v.

Pennsylvania Public Utility Comm'n, 791 F.2d 1111, 1115-16 (3rd Cir. 1986); *Arkansas Power & Light Co.* v. *Missouri Public Service Comm'n,* 829 F.2d 1444 (8th Cir. 1987).

Other courts have reached the identical results in cases arising under other federal statutes. *Knudsen Corp.* v. *Nevada State Dairy Comm'n,* 676 F.2d 374 (9th Cir. 1982); *Baggett* v. *Department of Professional Regulation,* 717 F.2d 521, 524 (11th Cir. 1983); *International Bhd. of Elec. Workers* v. *Public Service Comm'n,* 614 F.2d 206, 212 n.1 (9th Cir. 1980). They, too, hold that *Burford* abstention cannot be applied when there is a substantial federal preemption challenge to a state agency's jurisdiction. Thus, the conflict is stark and clear.[10]

3. The Fifth Circuit also has suggested that abstention under the doctrine of *Younger* v. *Harris,* 401 U.S. 37 (1971), "seems appropriate." *NOPSI I,* 798 F.2d at 863. Under *Younger,* a federal district court cannot enjoin an ongoing state judicial or quasi-judicial enforcement proceeding that implicates important state interests, when there is an adequate opportunity in the state proceeding to raise the federal claim. *See Middlesex County Ethics Committee* v. *Garden State Bar Ass'n,* 457 U.S. 423 (1982).

However, *Younger* abstention is proper only if the state proceeding implicates "important state interests." *Middlesex County Ethics Committee* v. *Garden State Bar Ass'n, supra,* 457 U.S. at 432. Contrary to the Fifth Circuit holding, other courts of appeals have held that the state interest in regulating retail rates, however important, cannot give the state an "overriding interest" in adjudicating federal preemption claims that go to the "power of the

[10]Indeed, the Solicitor General told this Court in 1987, after discussing various courts of appeals holdings, that these decisions "amply reveal a clear circuit conflict on the important issue whether abstention is appropriate in the context of a preemption claim based on the filed rate doctrine." Solicitor General's 1987 NOPSI Mem., p. 22 n.13.

state administrative agency to proceed at all;" "no deference is due state proceedings which would entrench upon the exclusive federal domain." *Baggett* v. *Department of Professional Regulation,* 717 F.2d 521, 524 (11th Cir. 1983).

Three courts of appeals have now held that *Younger* abstention is improper in suits raising the precise Federal Power Act preemption claims at issue here. They reason that the "legitimate state interest contemplated by *Younger* . . . does not exist when the state action has been preempted or foreclosed" by a federal statute, *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n,* 772 F.2d 404, 417 (8th Cir. 1985), and that the "notion of 'comity' embodied by the *Younger* doctrine is 'not strained when a federal court cuts off state proceedings that entrench upon the federal domain.'" *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n,* 791 F.2d 1111, 1117 (3rd Cir. 1986) (citations omitted); *accord, Appalachian Power Co.* v. *Public Service Comm'n of West Virginia,* 614 F.Supp. 64, 70-71 (S.D. W. Va.), *aff'd,* 770 F.2d 159 (4th Cir. 1985). *See also Champion Int'l Corp.* v. *Brown,* 731 F.2d 1406, 1409 (9th Cir. 1984).

4. The issue in this case is whether the Council can disregard FERC's exclusive jurisdiction over the question of the prudence, and the allocation, of the costs of Grand Gulf 1. This question has been conclusively decided. *See Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore, supra; Nantahala Power & Light Co.* v. *Thornburg,* 476 U.S. 953 (1986). As Justice Scalia stated, *Mississippi Power & Light* establishes "who has jurisdiction, FERC or the States, to evaluate the prudence of a particular utility's entering pooling arrangements with affiliated companies." *Mississippi Power & Light Co., supra,* 56 U.S.L.W. at 4759 (Scalia, J., concurring), slip op. at 7. Although the point should be obvious to any objective reader, it has been ignored by the New Orleans City Council. NOPSI thus seeks nothing more than its estab-

lished rights under federal law. There is no state law issue, and this case epitomizes the type of cases that federal district courts were created to decide.

Neither this Court's precedents, common sense, nor deference to state courts requires or permits federal abstention in this case. In any of at least five other circuits, the door of the federal courthouse would have been open to petitioner. Indeed, NOPSI's affiliates were able to obtain the federal court injunction required to prevent a different state utility commission from interfering with recovery of FERC-mandated Grand Gulf 1 costs.[11] Such an important issue as the availability of federal courts to vindicate federal rights cannot depend on the fortuity of whether the supplicant and the courthouse are in Arkansas or Louisiana.

[11] *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n*, 772 F.2d 404 (8th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986). *See Arkansas Power & Light Co.* v. *Missouri Public Service Comm'n*, 829 F.2d 1444 (8th Cir. 1987).

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

HERSCHEL L. ABBOTT, JR.
DAVID G. RADLAUER
EDWARD H. BERGIN
R. LEWIS MCHENRY
JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE
201 St. Charles Avenue
New Orleans, LA 70170
(504) 582-8000

REX E. LEE*
DAVID W. CARPENTER
JAMES A. HUTTENHOWER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

THOMAS O. LIND
Vice President—Regulatory Counsel
New Orleans Public Service Inc.
317 Baronne Street
New Orleans, LA 70112
(504) 595-2218

Attorneys For Petitioner

Dated: August 26, 1988

*Counsel of Record

COURT OF APPEALS OPINION
[JULY 28, 1988]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 88-3194

NEW ORLEANS PUBLIC SERVICE, INC.,

Plaintiff-Appellant,

versus

THE COUNCIL OF THE CITY OF NEW ORLEANS, ET AL,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

(July 28, 1988)

Before RUBIN, GARZA and JONES, Circuit Judges.

RUBIN, Circuit Judge:

In 1986 this court decided that a federal district court had not abused its discretion in abstaining from deciding federal issues presented in suit to enjoin a state agency's proceeding to fix the retail rates that might be charged by a public utility. Bound by this decision, we hold again that the same distict court did not abuse its discretion in failing to take jurisdiction over issues of federal law at a later stage of the same proceeding.

I.

This is the fourth federal court battle in a legal war that began almost a decade ago. New Orleans Public Service, Inc. (NOPSI), a subsidiary of Middle South Utilities, Inc., a public utility

holding company, sells electric power to consumers in the City of New Orleans. It continues to seek a federal forum for its claims against the New Orleans City Council, which by state law fixes the utility rates charged consumers in New Orleans. It charges that the Council is violating federal law by preventing NOPSI from passing on to the consumers all of the costs of NOPSI'S purchase of power generated by a nuclear reactor at rates fixed by the Federal Energy Regulatory Commission (FERC).

Middle South owns and therefore controls Louisiana Power & Light Co., Mississippi Power & Light Co., Arkansas Power & Light Co., and NOPSI, collectively known as the Middle South Companies, all of which are engaged in distributing energy, as well as System Energy Resources, Inc. (SERI), which generates energy. In the late 1960's, Middle South sought to meet projected increases in demand and to diversify the fuel base of its entire system by adding coal and nuclear generating units. Because Middle South found it impractical for each of the four operating companies to finance and construct a nuclear power facility, it formed a new subsidiary, Middle South Energy, Inc. (MSE), a corporate predecessor of SERI, to finance, own, and operate two nuclear reactors, Grand Gulf I and II. Middle South later decided for economic reasons not to build Grand Gulf II, but to proceed with the construction of Grand Gulf I, a 1250 megawatt nuclear generating plant. In 1974, NOPSI, Louisiana Power, Mississippi Power, and Arkansas Power all committed themselves to sharing the construction cost of Grand Gulf, which MSE projected to be $875 million.

After the nuclear disaster at Three Mile Island, federal regulatory authorities adopted stricter regulations for the construction of nuclear plants. As a result of this and other factors, construction of the Grand Gulf nuclear plant took longer and became drastically more expensive than originally anticipated, amounting in the end to $3.6 billion. Consequently, the wholesale cost of power produced at Grand Gulf greatly exceeds that of power

produced in other system facilities. Moreover, even as Grand Gulf was under construction, it became clear that the demand for its energy would be less than originally anticipated.

In 1982, the Middle South Companies submitted to FERC, which has exclusive jurisdiction over interstate wholesale power rates,[1] two agreements. The first was a new System Agreement, which set forth the terms and conditions for coordinated operations and wholesale transactions among the four companies, including a scheme of capacity equalization payments, which were designed to ensure that each company contribute proportionately to the total costs of generating power for the system. The second was a Unit Power Sales Agreement, which provided wholesale rates for the sale of Grand Gulf capacity and energy to the operating companies. The Unit Power Sales Agreement allocated 29.8% of the Grand Gulf costs to NOPSI.

FERC assigned each agreement to a different administrative law judge, charging them with the task of determining whether the agreements were "just and reasonable" within the meaning of the Federal Power Act.[2] Each ALJ held extensive hearings, in which numerous parties representing consumer interests and the various state regulatory agencies participated. At these hearings, the New Orleans City Council appeared to protest the proposed rates and the allocations made pursuant to the Sales Agreement. The City Council and other utility regulatory bodies argued that FERC should reduce the allocations of the high-cost and hence relatively unattractive nuclear power to their constituents.

Three years later, in 1985, FERC issued an order modifying the Sales Agreement to provide for the allocation of power and costs from Grand Gulf as follows: 17 percent to NOPSI, 14 percent to Louisiana Power, 33 percent to Mississippi Power, and 36

[1]16 U.S.C. § 824(b) (1982); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, ___, 106 S.Ct. 2349, 2352 (1986); *see also* 16 U.S.C. §§ 824d, 824e (1982).

[2]16 U.S.C. § 824(a) (1982).

percent to Arkansas Power.[3] As the Supreme Court noted in Mississippi Power & Light Co. v. Mississippi ex rel Moore,[4]

> [FERC] did not expressly discuss the "prudence" of constructing Grand Gulf and bringing it on line, [but it] implicitly accepted the uncontroverted testimony of the [Middle South] executives who explained why they believed the decisions to construct and to complete Grand Gulf I were sound, and approved the finding that "continuing construction of Grand Gulf Unit No. 1 was prudent because Middle South's executives believed Grand Gulf would enable the Middle South system to diversify its base load fuel mix and, it was projected, at the same time, produce power for a total cost (capacity and energy) which would be less than existing alternatives on the system."[5]

The state regulatory agencies appealed the FERC allocations, and the United States Court of Appeals for the District of Columbia Circuit reversed the FERC decision.[6] On remand, however, FERC reaffirmed its original 1985 allocations.[7]

NOPSI appealed to the New Orleans City Council in 1985 for a retail rate increase to cover the increase in wholesale costs that the FERC order would require it to pay. The Council responded with a resolution initiating an investigation into "all aspects of NOPSI's prudence regarding its decisions to enter into its arrangements to purchase a portion of Grand Gulf 1 for the purpose of determining what portion, if any, of NOPSI's Grand Gulf 1

[3]Opinion and Order Setting Just Reasonable and Non-Discriminatory Rates, 31 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,305 (June 13, 1985) (Opinion No. 234).

[4]____ U.S. ____, ____ S.Ct. ____, No. 86-1970 (June 24, 1988).

[5]*Id.* at ____, ____ S.Ct. at ____ (quoting Middle South Energy, Inc., 26 Fed. Energy Reg. Comm'n Rep. (CCH) at ¶¶ 65,112-65,113 (1984)).

[6]Mississippi Indus. v. FERC, 822 F.2d 1104 (D.C. Cir.), *cert. denied.* 108 S.Ct. 501 (1987).

[7]System Energy Resources, Inc., 41 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,238 (Nov. 30, 1987) (Opinion No. 292).

expense shall be assumed by its shareholders, rather than passed through to its retail ratepayers" (the Prudence Resolution). The Council also refused to approve the rate increase pending the outcome of this investigation.

While the Council was conducting its prudence inquiry, the Supreme Court decided Nantahala Power & Light Co. v. Thornburg,[8] a case that came to the Court on appeal from a state supreme court decision. In *Nantahala,* the Court held that FERC has exclusive jurisdiction over interstate wholesale power rates, and once it has allocated wholesale power, a state regulatory body may not refuse to recognize that allocation. This is a necessary consequence of the filed rate doctrine, which prescribes that interstate power rates filed with or fixed by FERC must be given binding effect by state utility commissions determining intrastate rules.

After the City Council had refused to approve its requested rate increase, NOPSI sought a federal court injunction requiring the Council to pass through, immediately and fully, the increased costs of Grand Gulf to ratepayers and to prevent the Council from conducting its prudence inquiry. The district court dismissed the suit, holding that it lacked subject matter jurisdiction and that, even if it had jurisdiction, it should abstain. While an appeal to this court was pending, in March, 1986, the City Council and NOPSI reached a partial settlement of NOPSI's application for a rate increase. NOPSI agreed to absorb $51.2 million of the costs of Grand Gulf. The Council allowed NOPSI to make a phased interim rate increase, to which NOPSI agreed, in order to moderate the effects of "rate shock" on New Orleans ratepayers. Both parties agreed, however, that this settlement did not affect the Council's continuation of its prudence inquiry.

[8]476 U.S. 953, 106 S.Ct. 2349 (1986).

In *NOPSI I,* this Court initially reversed both district court rulings,[9] but on rehearing affirmed the district court's decision to abstain, in order to avoid interfering with a comprehensive state regulatory scheme.[10] The district court relied upon this opinion, which we will discuss again in detail, in its decision to abstain from hearing the present case.

In April, 1987, the City Council completed its hearings and began deliberations. NOPSI again sought an injunction from the federal district court, arguing that the Council was unreasonably delaying a decision and that its inquiry encroached on areas of exclusive FERC jurisdiction. Later amending its complaint, NOPSI sought only an injunction against any action by the Council that would force NOPSI's shareholders to absorb part of the costs of Grand Gulf that FERC had allocated to NOPSI. NOPSI contended that the announced purpose of the Council's prudence inquiry intruded upon an area within FERC's exclusive jurisdiction. When the district court decided both that the case was not ripe for decision and that, even if it was, it should abstain, NOPSI appealed to this court.

In *NOPSI II,*[11] this court once again noted that the Federal Power Act gives FERC exclusive authority to regulate the wholesale sale of power in interstate commerce while allowing the states to retain their traditional police power to regulate intrastate retail sales. The *NOPSI II* opinion recognized that the Prudence Resolution and the subsequent Council hearing could "certainly be interpreted as directed toward areas now off-limits to state regulators."[12]

[9]New Orleans Pub. Serv., Inc. v. City of New Orleans, 782 F.2d 1236 (5th Cir.), *modified,* 798 F.2d 858 (5th Cir. 1986), *cert. denied,* ___ U.S. ___, 107 S.Ct. 1910 (1987).

[10]New Orleans Pub. Serv. Inc. v. City of New Orleans, 798 F.2d 858 (5th Cir. 1986), *cert. denied,* _____ U.S. _____, 107 S.Ct. 1910 (1987).

[11]New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans, 833 F.2d 583 (5th Cir. 1987).

[12]*Id.* at 586.

The opinion, however, further recognized that the Council's inquiry presented "only a *possibility* of harm to NOPSI. If such harm occurs, the validity of the New Orleans City Council's action will depend on facts not yet in existence."[13] NOPSI would suffer no irreparable harm pending completion of the prudence inquiry. Therefore the injunction issue was not yet ripe, and the Court found it unnecessary to address the district court's alternative decision to abstain.

After completing the lengthy prudence inquiry, the Council adopted a rate order on February 4, 1988. The order disallows $135 million of NOPSI's deferred Grand Gulf costs and requires NOPSI to write this sum off its rate base. It also reduces NOPSI's rate increases, planned to begin on April 9, to reflect this disallowance. The Council based its actions on these conclusions:

(1) NOPSI's oversight and review of its Grand Gulf obligation was uncritical and severely deficient. NOPSI's management remained ignorant of important information and significant events that affected NOPSI's Grand Gulf commitment at the same time that it was attempting to portray Grand Gulf as a great benefit to ratepayers.

(2) NOPSI made no effort to reduce its risk exposure in the wake of the Three Mile Island Nuclear incident in 1979-80, which demonstrated the risks of operating a nuclear reactor. Instead, it committed itself to take a share of the plant that FERC later found to be excessive.

(3) NOPSI imprudently failed to reduce the risk of its Grand Gulf commitment by selling a portion of its share of the power off-system, that is, to some other user. It made no attempt to ascertain whether off-system sales could be accomplished, despite its having made representations to the Council in 1980 that it would sell the power elsewhere if the Council desired.

[13] *Id.* at 588 (emphasis added).

The Council also determined that NOPSI's management was imprudent in committing NOPSI in 1974 to an indeterminate responsibility to pay for Grand Gulf, but it took no action based on this finding. Instead, it concentrated its inquiry and based the disallowance of the rate increase on actions NOPSI's management failed to take at the retail level to reduce the exposure of New Orleans ratepayers to the excessive risks and costs of the Grand Gulf project.

The Council also asserts that, in reaching its decision, it determined that disallowance of the full amount warranted by NOPSI's imprudence would cause NOPSI to become insolvent. It therefore disallowed only that portion of the excess costs—minus an additional ten percent "buffer"—attributable to imprudent management that the Council determined the utility could stand financially.

NOPSI therefore resorted once again to federal court, seeking injunctive and declaratory relief from the Rate Order. It contends that the Order is inconsistent with and preempted by federal law, that the federal courts are vested with exclusive jurisdiction by the Federal Power Act, 16 U.S.C. § 825p, and that, if the Rate Order is allowed to stand, it will suffer irreparable harm. It contends that the Council had assured it in the settlement agreement that it would be allowed to recover the $135 million in deferred costs through future rate increases. The elimination of this asset has drastically reduced its common equity and eliminated its retained earnings. It has been unable to sell rate recovery bonds as it had planned to do in March, 1988, will be unable to sell additional rate recovery bonds for several years, and is threatened with possible calls for redemption of $115 million in outstanding rate recovery bonds. NOPSI states that it also needs funds to continue to pay its FERC-mandated bill for Grand Gulf and other operating expenses. It will be unable to pay dividends on either preferred or common stock for at least several years, and its ability to continue as a viable entity is drastically impaired.

The district court, following this court's decision in *NOPSI I,* found that the Johnson Act[14] did not deprive it of jurisdiction over the suit; it did not have exclusive jurisdiction of the suit under the Federal Power Act; and it should abstain from exercising its jurisdiction, deferring to the state proceedings. Relying on the Supreme Court decision in Burford v. Sun Oil Co.,[15] the court distinguished *Nantahala,* stating that *Nantahala* did not involve a prudence issue. The utility regulatory body in *Nantahala* had simply refused to recognize the FERC allocation without any consideration of managerial prudence or other cost savings available. In this case, on the other hand, the Council had explicity recognized the FERC-allocated costs, but had determined that, given those costs, NOPSI's management should have reduced their impact by selling some of its Grand Gulf power "off system," as its President had earlier said it could do.

The district court based its decision to abstain on the concept stated in *NOPSI I,* that "the regulation and adjustment of local utility rates is of paramount local concern and a matter which demands local administrative expertise."[16] The fact that the Council had completed its prudence inquiry did not end the need for state administrative involvement. The Council's Rate Order is subject to review in Louisiana state court. (In fact, NOPSI has sought an injunction in state court; it understandably could not forego that avenue for relief if this suit failed. The state trial court has denied the injunction and NOPSI has appealed to the state intermediate appellate court, seeking expedited consideration. The state trial court record was not scheduled to be filed with the state appellate court until July 15, 1988, however, and that appellate court has therefore deemed the motion for expedited appeal premature.)

[14]28 U.S.C. § 1342 (1982).
[15]319 U.S. 315, 63 S.Ct. 1098 (1943).
[16]798 F.2d at 862.

The federal district court also observed, however, that it was not ready to assume that many, if any, purchasers could be found today to buy the power allocated to NOPSI. It continued:

> Indeed, this court is somewhat mystified by the Council's logic in arriving at the $135 million disallowance in the Rate Order. In the Rate Order, the Council simply concluded that since [NOPSI's President] said so, savings were actually possible. Then, the Council seemingly pulled from thin air a figure of 8% for the prudence disallowance. However, the Council, and in this case, everyone else knows that the 8% figure was not pulled from thin air but represents the difference between FERC's 17% allocation and what NOPSI consistently claims as its relative share in the MSU system, i.e. 9%. Thus, the disallowed costs bear no apparent relationship to the savings NOPSI is said to have foregone. Must not the savings posited as the reason for the disallowance be at least possible in an actual economic market? Furthermore, must not the ultimate disallowance bear some rational relationship to the possible savings which support that disallowance? These questions must be resolved on another day in another court.

The district court did not reach the other factual issues. We must assume that the court thought it should abstain even if NOPSI were able to prove, as it alleges, with some apparent evidentiary support, that what was not clear when *NOPSI I* was decided is now clear: the Rate Order results in "trapping" FERC allocated costs in violation of federal law; important facts have therefore changed since the decision in *NOPSI I;* the Rate Order itself demonstrates that the disallowance of rate increases was based on factors that the state could not legally consider; and consequently the Order "is beyond the Council's retail ratemaking authority and violates federal law."

II.

If the jurisdiction of federal courts over this dispute is made exclusive by the Federal Power Act, the district court should not have abstained. The Act grants federal courts exclusive

jurisdiction over all suits brought to enforce any "duty created by . . . any rule, regulation, or order" promulgated under the Act.[17] NOPSI's thesis is that the Act creates a duty on the part of the Council to recognize for retail ratemaking purposes NOPSI's FERC allocation, net of cost savings in other areas, and that the duty must be enforced by and can be enforced only in federal court.

In *Nantahala,* the Supreme Court expressly held that the filed rate doctrine requires local utility regulators to "allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price."[18] The Court further stated, "[o]nce FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable."[19] Correspondingly, in *NOPSI II* this court stated:

> [O]nce the FERC has allocated wholesale power, a state regulatory body may not refuse to recognize that allocation. The state may not, for example, find the allocation unreasonable and "trap" any extra costs by refusing to allow the utility to pass those costs on to consumers.[20]

After oral argument had been heard in this case, the Supreme Court rendered its opinion in Mississippi Power & Light Company v. Mississippi ex rel Moore, a case which, like *Nantahala,* came to the Court by direct appeal.[21] In *Mississippi Power,* the Court held that the FERC proceedings preempted a prudence

[17] 16 U.S.C. § 825p (1982) provides in pertinent part:

> The District Courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of this chapter or any rule, regulation, or order thereunder.

[18] 476 U.S. at ____, 106 S.Ct. at 2356.

[19] *Id.* at ____, 106 S.Ct. at 2357.

[20] 833 F.2d at 586 (citations omitted).

[21] ____ U.S. ____, ____ S.Ct. ____, No. 86-1970 (June 24, 1988.)

inquiry by a state regulatory commission. The *Mississippi Power* prudence inquiry differed somewhat from the City Council's inquiry: it was directed to the prudence of entering into the Sales Agreement and the Grand Gulf project, while the Council's order is directed at NOPSI's asserted imprudence in failing to resell the power it had agreed to, and is now bound by the FERC order to, buy. Nonetheless, the language of the opinion seems to foreclose the latter kind of prudence inquiry as well. Thus, for example, the Court stated:

> States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair. FERC-mandated allocations of power are binding on the States, and States must treat those allocations as fair and reasonable when determining retail rates. . . .
>
> States may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates. "The filed rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by their payment of just and reasonable FERC-set rates. When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate. . . . Such a 'trapping' of costs is prohibited."[22]
>
> . . . Thus we conclude that the Supremacy Clause compels the [state regulatory commission] to permit MP&L to recover as a reasonable operating expense costs incurred as the result of paying a FERC-determined wholesale rate for a FERC-mandated allocation of power.
>
> . . . [I]t might well be unreasonable for a utility to purchase unnecessary quantities of high cost power, even at FERC-approved rates, if it had the legal right to refuse to buy that power. But if the integrity of FERC regulation is to be preserved, it obviously cannot be unreasonable for MP&L

[22] *Id.* at ____, ____ S.Ct. ____ at ____ (quoting Nantahala Power & Light Co. v. Thornburg, 476 U.S. at 970, 106 S.Ct. at 2359).

to procure the particular quantity of high-priced Grand Gulf power that FERC has ordered it to pay for. Just as Nantahala had no legal right to obtain any more low cost TVA power than the amount allocated by FERC, it is equally clear that MP&L may not pay for less Grand Gulf power than the amount allocated by FERC.

. . . .

. . . Thus FERC's order specificially bars a state regulatory agency from evaluating the prudence of Grand Gulf "in light of local conditions."[23]

In *NOPSI I*, this court held that it does not follow from *Nantahala* that the duty imposed on a state regulatory body to recognize FERC allocations and rates must be enforced by a federal court. While the Federal Power Act did grant FERC exclusive authority to regulate interstate transmission and sale at wholesale of electric energy, it reserved to the states regulatory jurisdiction over generation facilities and the intrastate transmission of electric energy.[24] This dichotomy of supervision made it foreseeable to Congress that what has happened in Louisiana might indeed come to pass: conflicts might arise over a state's attempt to regulate matters reserved to the FERC. The filed rate doctrine was developed to ensure the supremacy of FERC's orders in state as well as federal proceedings.[25] It does not establish federal exclusivity.

NOPSI I therefore rejected the claim that federal jurisdiction is exclusive:

> The existence of [a] "bright line" [between federal and state jurisdiction] colors the way we view a preemption claim involving the Federal Power Act. NOPSI has attempted to depict the situation before us as one in which the Council is stepping into the realm of *wholesale* rate making, a field

[23] *Id.* at ___, ___ S.Ct. at ___.

[24] 16 U.S.C. §§ 824(b) (1982); *see also NOPSI I*, 798 F.2d at 860.

[25] *See Nantahala*, 476 U.S. at ___, 106 S.Ct. at 2355.

> under the exclusive jurisdiction of FERC. NOPSI focuses on the disruption of a *federal* scheme. Yet federal court intervention here may constitute a disruption of a *state* regulatory scheme, for *retail* rate making is clearly a field left to the jurisdiction of the states. . . . *Nantahala* recognizes that retail rates need not necessarily be increased to reflect the corresponding increase in wholesale rates set by FERC. Instead, local councils are permitted the autonomy preserved to them by the Federal Power Act and can consider cost savings in other areas relevant to the setting of retail rates.[26]

Thus *NOPSI I* holds that while state regulators are bound by FERC decisions and the filed rates doctrine, the doctrine may be invoked in state proceedings and the existence of a filed rate issue does not dictate federal court jurisdiction. As the opinion in *NOPSI I* acknowledges,[27] two other circuits have reached the same conclusion, deciding to abstain,[28] while three other courts have refused to do so.[29]

III.

The Supreme Court has held that, in three different situations, a federal court with jurisdiction over a matter that also lies within the jurisdiction of a state court or agency should abstain from exercising its jurisdiction.[30] When a case involves unsettled

[26] *NOPSI I*, 798 F.2d at 860-61 (emphasis in original).

[27] *Id.* at 862 n.1.

[28] *See* Aluminum Co. of America v. Utilities Comm'n, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052, 104 S.Ct. 1326 (1984); American Elec. Power Co. v. Kentucky Pub. Serv. Comm'n, 787 F.2d 588 (6th Cir. 1986); *but see* Appalachian Power Co. v. Public Serv. Comm'n of West Virginia, 770 F.2d 159 (4th Cir. 1985), *aff'g without opinion* 614 F. Supp. 64 (S.D. W.Va. 1985).

[29] *See* Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n, 791 F.2d 1111 (3d Cir. 1986); Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm'n, 772 F.2d 404 (8th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 884 (1986); International Bhd. of Elec. Workers, Local Union No. 1245 v. Pub. Serv. Comm'n, 614 F.2d 206, 212 n.1 (9th Cir. 1980).

[30] Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813-17, 96 S.Ct. 1236, 1244-46 (1976).

questions of state law, the resolution of which may make it unnecessary to decide a federal constitutional question, the federal court should abstain pending resolution of the state-law questions by a state court,[31] a doctrine known as *Pullman* abstention after the Supreme Court case that first invoked it. A federal court should also abstain from deciding a case to avoid needless conflict with a state's administration of its own affairs, a rule applied in Burford v. Sun Oil Co.[32] In Younger v. Harris,[33] the Supreme Court ruled that a federal court should abstain from deciding actions brought in an equitable setting when considerations of comity and federalism, relating both to a state's interest in conducting a pending state court proceeding and to the state's ability to consider federal constitutional claims in that setting, so dictate.

In Colorado River Water Conservation District v. United States,[34] the Supreme Court approved dismissal of a federal court suit on the basis of "considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation,' "[35] although abstention

[31]Railroad Comm'n v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *see also Colorado River*, 424 U.S. at 814, 96 S.Ct. at 1244; *see generally* 17 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure §§ 4241-42 (1978 & Supp. 1987).

[32]Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943); *see also Colorado River,* 424 U.S. at 814-15, 96 S.Ct. at 1244-45; County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959); *see generally* Wright, Miller & Cooper, *supra* note 31, at §§ 4241, 4244.

[33]*See* Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *see also* Ohio Bureau of Employment Servs. v. Hodory, 431 U.S. 471, 477, 97 S.Ct. 1898, 1902-03, 52 L.Ed.2d 513 (1977); *Colorado River,* 424 U.S. at 816, 96 S.Ct. at 1245-46; *see generally* Wright, Miller & Cooper, *supra* note 31, at §§ 4241, 4251-55.

[34]424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

[35]*Id.* at 817, 96 S.Ct. at 1246 (quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183, 72 S.Ct. 219, 221, 96 L.Ed. 200, 203 (1952)).

would not have been appropriate under previously recognized abstention doctrines. In *Colorado River,* the Court observed that "the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention."[36]

In Evanston Insurance Co. v. Jimco, Inc.,[37] on which NOPSI relies, we considered the application of the *Colorado River* rule because judicial proceedings were pending in both state and federal court and only considerations of judicial administration were involved. In *NOPSI I,* however, the district court based its decision to abstain primarily on the *Burford* rule, seeking to avoid intrusion into the state administration of a complex state regulatory system. The *Evanston Insurance* decision is therefore not applicable here.

Turning to the appropriateness of *Burford* abstention in this case, we do not write on a clean slate. While the district court's decision to abstain is reviewable, we are not to decide whether we would write the same opinion if we were sitting as a trial court, but whether the district court abused its discretion in reaching its decision, a question whose answer requires at least some deference to the district court's views. In addition, we are bound by the text and the implicit philosophy of *NOPSI I.* In *NOPSI I* this court affirmed the district court's decision to abstain because exercising federal jurisdiction would interfere with the state regulatory system:

> [T]he regulation and adjustment of local utility rates is of paramount local concern and a matter which demands local administrative expertise. The regulatory system is complex. In addition, the Louisiana state courts are fully able to address NOPSI's complaints about Council actions: appeals from Council orders are to be filed with the Civil District

[36]*Id.* at 818, 96 S.Ct. at 1246.

[37] No. 87-3605 (5th Cir. May 17, 1988).

> Court for the Parish of Orleans . . . . Nor would federal abstention foreclose the United States Supreme Court from entertaining NOPSI's preemption claim should it wind its way up through the state courts, as is demonstrated by the path of the recent *Nantahala* case.[38]

The opinion continued, "Although we do not intimate that abstention in the face of a preemption claim under the Federal Power Act may never constitute an abuse of discretion, abstention should perhaps more often obtain in cases presenting a question of preemption under the Federal Power Act than would be so in cases presenting other types of federal preemption claims."[39]

The *NOPSI I* opinion also stated, "[M]oreover, on these facts, abstention seems appropriate under the doctrine of Younger v. Harris."[40] *Younger* would justify abstention because the Council proceedings constituted an ongoing state judicial proceeding, involving important state interests, and in that proceeding NOPSI had an adequate opportunity to litigate its federal claims. The opinion noted, in connection with the appropriateness of *Younger* abstention, the absence of "bad faith, harrassment, or other exceptional circumstances."[41] *NOPSI I* thus recognized a second basis for its affirmance of the district court's decision to abstain.

The court in *NOPSI I* did not partially reverse the district court's decision to abstain by requiring it to decide whether the Council should be enjoined to allow NOPSI to pass on all of the costs allocated by FERC while affirming that decision only insofar as it abstained from interfering with the City Council's retail ratemaking functions. It decided instead to abstain totally. When a federal court decides to abstain, it does not decide to keep federal hands off only so long as the state agency behaves as the

[38] 789 F.2d at 862.

[39] *Id.* at 861.

[40] *Id.* at 863.

[41] *Id.* at 864; *see* Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 435, 102 S.Ct. 2515, 2523 (1982).

court thinks proper. Instead, it decides not to interfere at all, leaving to the state agency, the state courts, and, ultimately, the United States Supreme Court, the interpretation of both state and federal law and the ultimate protection of the federal constitution.

While more facts are now known, NOPSI foresaw the issues these facts have raised. The first *NOPSI* opinion outlined the issues NOPSI raised at that time:[42]

> NOPSI first raised a statutorily-based preemption claim. NOPSI alleged that the Council, in setting NOPSI's retail rates, had refused to recognize the expenses NOPSI was required to pay by FERC order: the Council's rate freeze assumed in essence that the FERC opinion had never been issued, and that NOPSI was obtaining no Grant Gulf Unit I power. The refusal to recognize FERC-determined wholesale costs for retail rate-making purposes frustrated the FERC order allocating costs, thereby violating FERC's exclusive authority to regulate wholesale energy under the Federal Power Act, 16 U.S.C. §§ 824-824k. NOPSI also claimed that the Council's refusal to honor the FERC order constituted an impermissible burden on interstate commerce, as NOPSI would be rendered insolvent; the FERC order allocating costs among companies in several states would be frustrated; financial agreements among the MSU companies would be harmed; the operation of Grand Gulf Unit One would be threatened; and the viability of the interstate integrated electric system would be seriously undermined.

The opinion in *NOPSI I* noted that the challenge was only to "anticipated state agency action,"[43] but the issues before the court now are the same as those presented in that case. The only differences are that the administrative proceeding before the City Council has been completed and the Supreme Court has decided *Mississippi Power & Light*, a case in which abstention was not an

[42] 782 F.2d at 1238.

[43] 798 F.2d at 864 n.3.

issue. The Council proceeding, followed by the opportunity for state review, thus constitutes an ongoing judicial proceeding.[44]

In *NOPSI II*, NOPSI sought an injunction to prevent the Council from trapping the FERC-allocated Grand Gulf costs. Addressing the question whether the issue was ripe, the Council argued that the court should wait to see what action the Council took. Until then, the issue was not ready for court action. Now the Council has acted. It retreats to a second line of defense: the issue is ripe but the court should abstain. The Council's arguments in the successive cases appear to involve a certain amount of adroitness, but the opinion in *NOPSI I* nonetheless requires us to uphold the district court's decision to abstain.

IV.

The decision to abstain from intervening at an earlier stage and not to restrict the Council's action to purely retail ratemaking concerns, as may have been permitted by *Nantahala*, allowed the Council to proceed with a hearing at least ostensibly addressed to retail ratemaking. Abstention necessarily forces the state courts to consider the application of the Supreme Court decisions and will eventually present the Supreme Court itself, already burdened by a massive docket, with a case that may involve only the application of principles it has now clearly articulated. Only that Court can resolve the conflict among the federal courts about the appropriateness of abstention in this situation, and it has not yet spoken. This court has. In so doing, this circuit has made a rule for this case. NOPSI must seek relief elsewhere.

For these reasons, the judgment is affirmed.

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[44]*See* Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., ___ U.S. ___, ___, 106 S.Ct. 2718, 2723 (1986); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. at 432–34, 102 S.Ct. at 2521–22.

DISTRICT COURT OPINION AND ORDER [MARCH 10, 1988]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS PUBLIC SERVICE, INC., *VERSUS* THE COUNCIL OF THE CITY OF NEW ORLEANS, ET AL.	CIVIL ACTION NO. 88-559 SECTION "D" (2)

OPINION AND ORDER

For the third time in as many years these parties are before this court embroiled in a dispute over the Defendants', the Council of the City of New Orleans ("The Council"), regulatory actions concerning New Orleans Public Service, Inc. ("NOPSI") and Grand Gulf I, a nuclear power plant located near Port Gibson, Mississippi. NOPSI, a subsidiary of Middle South Utilities, Inc. ("MSU"), provides electric service to most of the City of New Orleans. NOPSI also engages in the production, wholesale interstate purchase, wholesale interstate sale and retail sale of electric power. With the exception of a brief period, the Council has exercised local regulatory jurisdiction over NOPSI since 1922.

Pursuant to an "Opinion and Order Setting Just Reasonable and Non-Discriminatory Rates," 31 F.E.R.C. (CCH) para. 61, 305 (June 13, 1985) ("Opinion No. 234"), the Federal Energy Regulatory Commission ("FERC"), allocated the costs of Grand Gulf I among four MSU subsidiaries: Arkansas Power & Light Co.; Louisiana Power & Light Co.; Mississippi Power & Light Co.; and NOPSI. NOPSI's share of Grand Gulf I costs under Opinion No. 234 is 17%. In July 1985, NOPSI began paying its 17% of the costs, approximately $13 million a month, to System

Energy Resources, Inc. ("SERI") (formerly Middle South Energy, Inc. ("MSE")), another MSU subsidiary and principal owner of Grand Gulf I.

NOPSI's third trip to this court, like its second,[1] arises out of the Council's investigation of NOPSI's prudence with respect to investment, oversight, and participation in the Grand Gulf I project. After the FERC issued Opinion No. 234, NOPSI initiated a retail rate making proceeding before the Council by requesting permission to increase its electric rates to recover expenses associated with Grand Gulf I. After several hearings and extensive federal court litigation (i.e., *NOPSI I*), on March 20, 1986 the Council adopted Resolution No. R-86-112, which accepted, subject to certain modifications, a settlement proposal advanced by NOPSI with respect to its application for permanent rate relief. The settlement required that NOPSI's shareholders absorb approximately $51.2 million of Grand Gulf I costs and provided that remaining costs would be phased into retail electric rates over a period of approximately twelve years, with annual rate increases limited to approximately 6%. The settlement expressly reserved to the Council the right to conduct an investigation of NOPSI's prudence with respect to Grand Gulf I.

On October 17, 1985, the Council adopted Resolution No. R-85-636 by which it initiated its inquiry into the prudence of NOPSI's involvement in Grand Gulf I. The prudence inquiry proceeded in three phases. The first, dealing primarily with

[1] *See, New Orleans Public Service, Inc. v. City of New Orleans,* No. 85-5273 (E.D. La. December 19, 1986), *aff'd,* 833 F.2d 583 (5th Cir. 1987) ("NOPSI II"). In *NOPSI II,* NOPSI sought an order preventing the Council from impermissibly "trapping" FERC allocated Grand Gulf I costs as a result of the Council's prudence inquiry. This court dismissed the suit in *NOPSI II* on grounds of ripeness and abstention. For a history of NOPSI's first trip to this court see the Fifth Circuit Opinion in *New Orleans Public Service, Inc. v. City of New Orleans,* 782 F.2d 1236, *withdrawn in part,* 798 F.2d 858 (5th Cir. 1986), *cert. denied,* 107 S. Ct. 1910 (U.S. 1987) ("NOPSI I").

substantive questions bearing on prudence, involved evidentiary hearings in April 1986. In May 1986, the Council set dates for additional discovery, testimony and hearings on the second phase which involved the economic impact of possible remedies if imprudence were ultimately found. Hearings on this second phase were held in October 1986. The passage of the Tax Reform Act of 1986 during the hearings required a material reconsideration of economic issues and a third and final hearing was held for that purpose in February 1987.

On February 4, 1988, by Resolution No. R-88-14, the Council formally concluded its prudence investigation by adopting its "Determinations and Order Regarding the Prudence of the Management of New Orleans Public Service, Inc. with respect to Grand Gulf I" ("the Rate Order"). The Rate Order requires a one-time disallowance and write-off by NOPSI of a sum equal to $135 million in NOPSI's deferred Grand Gulf I expenses and a reduction in planned rate increases commencing April 9, 1988 to reflect the $135 million disallowance. The Rate Order does not ostensibly question NOPSI's FERC-allocated Grand Gulf I costs and it expressly provides that the disallowance is *not* based on the determination that NOPSI was imprudent in committing to an indeterminate responsibility to pay for Grand Gulf I. Rate Order at 9-10. Rather, the Council determined that as a result of NOPSI's deficient and uncritical oversight of the Grand Gulf I project and its failure to realistically assess its heightened risk exposure in the wake of the Three-Mile Island incident, NOPSI imprudently failed to reduce the risk of its Grand Gulf commitment in 1979 and 1980 by selling a portion of its share of the nuclear power off-system and further did not even attempt to ascertain whether off-system sales could be accomplished notwithstanding its President's assurances to the Council that such sales were possible. Rate Order at 9-13.

In this suit, NOPSI seeks preliminary and permanent injunctive and declaratory relief from the Council's Rate Order. NOPSI alleges that the Rate Order is inconsistent with and preempted

by federal law, that this court is vested with exclusive jurisdiction by virtue of the Federal Power Act, 16 U.S.C. § 825p, and that if the Rate Order is allowed to stand NOPSI will suffer irreparable harm. The Council has moved to dismiss the Complaint on alternative grounds that the court is without jurisdiction to issue an injunction pursuant to the Johnson Act, 28 U.S.C. § 1342, that the court should abstain from exercising jurisdiction, and that the Complaint fails to state a claim upon which relief can be granted. Both NOPSI's Motion for a Preliminary Injunction and the Council's Motion to Dismiss are now before the court.

At the outset, it is important to note that as the Council has made a "factual attack" upon this court's subject matter jurisdiction, the court is "free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Evans v. Tubbe,* 657 F.2d 661, 663 (5th Cir. 1981). Moreover, it is encumbent upon NOPSI to prove that jurisdiction does in fact exist. *Menchaca v. Chrylser Credit Corp.,* 613 F.2d 507, 511 (5th Cir.), *cert. denied,* 449 U.S. 953, 101 S. Ct. 358, 66 L. Ed. 2d 217 (1980).

Having considered the Complaint, the Rate Order, the depositions and affidavits filed herein, the memoranda and attachments of counsel and the applicable law, and for reasons which follow, the court is of the opinion that: 1) The Johnson Act does not preclude jurisdiction in this case; 2) This court does not have exclusive jurisdiction under the Federal Power Act; and, 3) This court should abstain from exercising jurisdiction over the claims presented by NOPSI.

I.

In *NOPSI I*[2] this court held that the Johnson Act[3] precluded the court from enjoining the Council's exercise of regulatory

[2]*New Orleans Public Service, Inc. v. The City of New Orleans,* Civil Action No. 85-3398 (E.D. La. Sept. 16, 1985) *(NOPSI I* Slip Op.).

[3]The Johnson Act, 28 U.S.C. § 1342, provides:

The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public

(Footnote continued on next page.)

jurisdiction over NOPSI. Were this court not bound by subsequent Fifth Circuit precedent in *NOPSI I*,[4] this court would again, for essentially the same reasons, find that the four Johnson Act elements are present in this case. However, this court is not free to ignore the Fifth Circuit's pronouncement in NOPSI I. Accordingly, this court is constrained to hold that the Johnson Act does not preclude jurisdiction to enter the injunctive relief NOPSI seeks.

II.

Though *NOPSI I* supports the existence of subject matter jurisdiction in this case, the parties before the court and the issues presented are virtually identical to those in *NOPSI I* and *NOPSI II*, and this court is still convinced that abstention is the proper course under these circumstances. As this court explained in *NOPSI I*, abstention embodies the well-established principle that under the rule of comity in cases dealing with state laws, rules or policy decisions, equitable considerations will require a federal court to stay its hand. *NOPSI I*, Slip Op. at 13; *General Investment Service Corp. v. Wichita Water Co.*, 236 F.2d 464, 468 (10th Cir. 1956). Abstention is particularly appropriate where the exercise of federal court jurisdiction would disrupt a state's administrative process or interfere with a state's ability to formulate policies in complex matters of local concern. *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 2d 1424 (1943). *"Burford"*

(Footnote continued from previous page.)
utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

[4]*See* Note 1 *supra*.

abstention is appropriate where a state's regulatory scheme touches complex matters of paramount local concern which require administrative expertise and the state's regulatory scheme provides prompt judicial review in which questions of conflict with federal law can be effectively addressed. *NOPSI I*, 798 F.2d 858, 861–62.

As both this court and the Fifth Circuit have previously held, "the regulation and adjustment of local utility rates is of paramount local concern and a matter which demands local administrative expertise." *Id.* at 862. The fact that the Council has completed its prudence inquiry does not end the need for state administrative involvement. One of the driving concerns of *Burford* abstention is for the state's ability to formulate local administrative policy consistent with federal law without undue interference from federal courts. Exercise of jurisdiction at this stage would preclude the state court from assessing and formulating state policy. Finally, the Council's Rate Order is subject to review in Louisiana state court.[5] Indeed, the Council and other parties which had intervened in the prudence inquiry have filed suit in the Civil District Court for the Parish of Orleans in connection with the Council's Rate Order.[6] NOPSI has likewise filed an appeal in Civil District Court to preserve its rights pending our decision in this case.[7] Though NOPSI's desire to litigate issues of federal law in a federal forum is understandable, this court is confident that Louisiana's state courts are more than competent to handle any federal questions presented. Unlike NOPSI, this

[5]*NOPSI I*, 798 F.2d at 862.

[6]Both of these suits were removed by NOPSI to this court. Motions to Remand are currently pending in these cases. *Lambert Boissiere, Jr., et al. v. James M. Cain, et al.* Civil Action No. 88-581; *Alliance for Affordable Energy, Inc., et al. v. The Council of the City of New Orleans, et al.*, Civil Action No. 88-816.

[7]*New Orleans Public Service, Inc. v. The Council of the City of New Orleans, et al.*, No. 88-4511 (Civil District Court for the Parish of Orleans, March 7, 1988).

court does not believe that the Louisiana courts will dispose of federal issues "from a biased perspective." The Louisiana courts are bound to enforce federal law and this court can only assume that they will do so. Therfore, this court is convinced that *Burford* abstention is appropriate in this case.[8]

NOPSI argues that the FERC Opinion and Supreme Court precedent impose a duty on the Council to recognize and "pass through" FERC-allocated costs except where those costs are offset by cost savings in other areas unrelated to the FERC-allocated costs. This duty, NOPSI contends, is a duty created by a FERC opinion, and as such, is the subject of exclusive federal jurisdiction under the Federal Power Act, 16 U.S.C. § 825p. Thus, the argument goes, abstention is not appropriate since NOPSI cannot litigate in state court an issue reserved exclusively to federal court.

Central to NOPSI's argument is the Supreme Court opinion in *Nantahalla Power & Light Co. v. Thornburg*, ___ U.S. ___, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986). In *Nantahalla* the FERC had allocated the available sources of low-cost power between two utilities located in different states. This necessarily meant that the utility receiving the lower allocation of low-cost power, Nantahalla Power and Light Co. ("NP&L"), would have to purchase greater amounts of higher-cost power in order to meet retail demand and therefore would incur a higher average cost per unit of power at the wholesale level. The North Carolina Utilities Commission ("NCUC") simply substituted its own allocation of low-cost power in place of the FERC's for purposes of setting retail rates. Thus, under the NCUC's Order, NP&L was forced to calculate its retail rates as if it received more of the low-cost power than actually allocated by the FERC.

[8]This court also finds that *Younger* abstention is applicable in these circumstances. *See NOPSI I*, 798 F.2d 858, 863–64. The appellate review of the Council's Order constitutes an ongoing judicial proceeding implicating important state interests, and in that proceeding NOPSI will have an adequate opportunity to raise its federal claims. *Id.* at 864.

The Supreme Court held that on the facts presented, the filed rate doctrine, a principle rooted in the Supremacy Clause, required the NCUC to pass through in retail rates the wholesale costs based on the FERC's allocation of low-cost power. The court noted that while the NCUC was required to treat FERC-allocated costs as a "reasonably incurred operating expense for the purposes of setting an appropriate retail rate,"[9] the FERC allocation need not be passed through entirely where, as an incident of traditional ratemaking authority, the local regulator found cost savings in other areas to offset the FERC-allocated wholesale costs. The Court went on to conclude:

> But in this case, there is no finding or indication that [NP&L's] costs of obtaining purchased power have decreased, or that other costs of operation have declined dramatically. There is only NCUC's assertion that [NP&L] should have obtained more of the low-cost FERC regulated power than [NP&L] is in fact entitled to claim under FERC's order. Such a rationale runs directly counter to FERC's order . . . .

Nantahalla, 106 S. Ct. at 2358.

NOPSI reads *Nantahalla* expansively to require that except for offsets of cost savings actually experienced in areas completely unrelated to FERC-allocated costs, the Council must pass through all FERC-allocated wholesale costs in setting the retail rate NOPSI may charge its customers. This court does not read *Nantahalla* so expansively. The holding in *Nantahalla* must be read in the context of the court's analysis of underlying cases and in light of the facts presented to the Court.

After a careful reading, this court does not believe that the *Nantahalla* Court intended to set out an exhaustive catalog of permissible retail deviations from FERC allocated wholesale costs. Rather, the Court simply responded to the North Carolina

[9]*Nantahalla*, 106 S. Ct. at 2357 (quoting *State ex rel Utilities Commission*, 313 N.C. 614, 692, 332 S.E.2d 397, 443 (1985)).

Supreme Court's "oversimplification" of the *Narragansett*[10] line of cases and concluded that the facts present in NP&L were distinguishable from those in the *Narragansett* line. *Nantahalla*'s admonition that costs incurred by complying with FERC ordered energy allocations are to be passed to the consumer cannot be considered in splendid isolation. *Nantahalla* did not in any manner involve a prudency issue. In *Nantahalla* the NCUC simply refused to recognize the FERC's allocation without any consideration of managerial prudence or other cost savings available. In this case, the Council has explicitly recognized the FERC allocated costs, but it has determined that given those costs, NOPSI's management should have reduced the impact of those costs by selling some of its Grand Gulf power "off system" as James Cain, NOPSI's President, said NOPSI could do. Thus, the Council is not asserting that NOPSI should have obtained less Grand Gulf, FERC-regulated power than ordered by the FERC. In essence, the Council faults NOPSI not for buying a 'pig in a poke' but for failing to find a sucker to buy it when the faux-pas became apparent.[11] Though nuclear power may have seemed a wise option

[10]*Narragansett Electric Co. v. Burke,* 119 R.I. 559, 381 A.2d 1358 (1977), *cert. denied,* 435 U.S. 972, 98 S. Ct. 1614, 56 L. Ed. 2d 63 (1978); *Public Service Co. of Colorado v. Public Utilities Commission,* 644 P.2d 933 (Colo. 1982). In both cases the courts held that the regulatory authority need not automatically pass through in retail rates an increase in FERC-approved wholesale rates where the utility company has experienced "savings" in other areas which might offset the increased price . . . ." *Narragansett,* 119 R.I. at 568, 381 A.2d at 1363; *Public Service Co.,* 644 P.2d at 941.

[11]P.T. Barnum once said of suckers: "There's one born every minute." This court, however, is not ready to assume there are many, if any, such suckers purchasing electricity in the wholesale market today. Indeed, this court is somewhat mystified by the Council's logic in arriving at the $135 million disallowance in the Rate Order. In the Rate Order, the Council simply concluded that since James Cain said so, savings were actually possible. Then, the Council seemingly pulled from thin air a figure of 8% for the prudence disallowance. However, the Council, and in this case, everyone else knows that the 8% figure was

(Footnote continued on next page.)

when MSU and NOPSI first committed to Grand Gulf in the 1970's, recent events have proven it otherwise. So, while *Nantahalla* does foreclose the Council's review of the 17% mandatory allocation of FERC, it does not foreclose an inquiry into the prudency of NOPSI's acts or omissions in the face of the anticipated and unwelcome FERC allocation. These are the inquiries which the Council's Rate Order ostensibly addresses.

But even if this court accepted NOPSI's reading of *Nantahalla*, that opinion does not create a duty under the Federal Power Act, 16 U.S.C. § 825p. NOPSI's argument cannot be squared with the structure of the Federal Power Act ("FPA"), the Fifth Circuit's revised opinion in *NOPSI I*, or the language of Nantahalla itself. As this court and others have explained, the FPA delegated to the FERC exclusive authority to regulate interstate transmission and sale at wholesale of electric energy while reserving to the states regulatory jurisdiction over generation facilities and the intrastate transmission of electric energy. *NOPSI I,* 798 F.2d at 860. That conflicts might arise over a state's attempt to regulate matters reserved to the FERC was foreseeable. Courts therefore developed the filed rate doctrine to ensure the supremacy of the FERC's orders in *state* as well as federal proceedings. To hold that *Nantahalla*, which is based explicitly on the filed rate doctrine and preemption, creates a duty enforceable under § 825p flies in the face of numerous state court decisions, including *Nantahalla,* in which state courts have addressed federal issues of *preemption*. Were NOPSI's position correct state courts which routinely address preemption issues in utility rate cases would be

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not pulled from thin air but represents the difference between FERC's 17% allocation and what NOPSI consistently claims as its relative share in the MSU system, i.e. 9%. Thus, the disallowed costs bear no apparent relationship to the savings NOPSI is said to have foregone. Must not the "savings" posited as the reason for the disallowance be at least possible in an actual economic market? Furthermore, must not the ultimate disallowance bear some rational relationship to the possible savings which support that disallowance? These questions must be resolved on another day in another court.

without jurisdiction. Such a position is untenable. In *NOPSI I*, the Fifth Circuit implicitly rejected this proposition. This court does so explicitly. The issues reserved to the federal courts by 16 U.S.C. § 825p are those directly related to the FPA, the FERC's orders thereunder, and the obligations imposed by those orders.[12] This case simply presents no such issue.

NOPSI further argues that abstention is not appropriate since the Council's Rate Order is entirely preempted as a matter of federal law. This argument fails on two points: As discussed above, *Nantahalla* does not support preemption of the Council's Rate Order. But even if *Nantahalla* could be read to support preemption here, it does not preclude abstention where there is no direct facial conflict with the FERC Order or where the government has not preempted the entire field. *Aluminum Company of America v. Utilities Commission of North Carolina,* 713 F.2d 1024 (4th Cir. 1983), *cert. denied,* 465 U.S. 1052 (1984)("*Alcoa*"). Where the circumstances are otherwise appropriate for *Burford* abstention, this court need not examine the indirect effects of the Rate Order on the FERC allocation as a prerequisite to abstention. *Id.*

The Rate Order, on its face, sets only retail rates; it does not attempt to order that NOPSI pay SERI any amount different from that ordered by the FERC. Thus, there is no facial conflict with FERC Opinion No. 234. Furthermore, the division of federal and state authority in the Federal Power Act makes it clear that the government has not entirely preempted state regulation of retail sales of electricity. Since the circumstances are otherwise appropriate for *Burford* abstention, this court need not and will

[12]For example, the Federal Power Act imposes duties upon utilities, among others, to apply to the FERC for approval before disposition of certain property, § 825b; to refrain from granting undue preferences and unreasonable differences in rates, § 824d(b); and to keep certain records, § 825. Similarly, FERC Opinion 234 imposes on NOPSI the duty to pay SERI a certain percentage of the costs of Grand Gulf I. Any suit to enforce these duties would be subject to exclusive federal jurisdiction.

not look further. Despite NOPSI's persistent invocation of federal jurisdiction in *NOPSI I, NOPSI II* and here, in what is sure to become *NOPSI III,* the court remains convinced that abstention is the proper course under these circumstances. Like the path followed in *Nantahalla,* NOPSI's plea for relief should be litigated first in the state court forum. Either party may then seek United States Supreme Court review of the final determination by the Louisiana state courts. Accordingly;

IT IS ORDERED that the Council's Motion to Dismiss be and is hereby GRANTED and NOPSI's Complaint for Preliminary and Permanent Injunctive and Declaratory Relief is hereby DISMISSED without prejudice.

New Orleans, Louisiana, this 10th day of March, 1988.

UNITED STATES DISTRICT JUDGE

COURT OF APPEALS JUDGMENT
[JULY 28, 1988]

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 88-3194

D.C. Docket No. CA-88-559-D

NEW ORLEANS PUBLIC SERVICE, INC.,

Plaintiff-Appellant,

versus

THE COUNCIL OF THE CITY OF NEW ORLEANS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

Before RUBIN, GARZA, and JONES, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

July 28, 1988

ISSUED AS MANDATE: August 19, 1988